Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128

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NEW JERSEY PAYPHONE ASSOCIATION'S OPPOSITION TO PETITIONS FOR RECONSIDERATION OF STATES AND LECs

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SUMMARY

The Commission clearly has authority to deregulate the local coin rate. The statutory grant of preemptive authority to the Commission is "straightforward" and "unambiguous." Section 276(b)(1) (A) explicitly mandates the Commission to ensure that PSPs are "fairly compensated" for each and every completed intrastate " . . . call." Under principles of statutory construction and the Supreme Court's ruling in Louisiana, the explicit, specific mandate of Section 276(b)(1)(A) must prevail over the general terms of Section 2(b), and, as the later enacted provision, Section 276 also prevails.

Section 276 authorizes the Commission to address end user rates, not just, as several states assert, inter-carrier compensation. Even this narrow interpretation, however, would still give the Commission intrastate authority, and thus does not "harmonize" Section 276(b)(1)(A) with Section 2(b). Similarly, the Commission has authority to set local coin rates because Congress did not preclude the Commission from addressing "advance payment by consumers" (unless it is otherwise prohibited). It is also inconsistent with the legislative history to limit the Commission's authority to set local coin rates; Congress intended that "carriers and customers that benefit from the availability of a payphone should pay for the service they receive." (Emphasis added.)

The limitations some of the states attempt to put on Section 276(b)(1)(A) are inconsistent with the broad language. Section 276(b)(1)(A) does more than replace Part

69 access charge subsidies, existing contracts between PSPs and carriers, and the $6.00 per payphone interstate compensation. Section 276(b)(1)(A) is a replacement for all existing subsidies. Section 276 has broad purposes. The House Report states that "Section [276] terminates the current system of payphone regulation." Since local coin rates are subsidized, the FCC could not terminate the "current system" unless the compensation system ended the local coin subsidy.

The Commission's statement that there may be "locational monopolies" cannot be seized upon to argue that the whole payphone market is not competitive, that "locational monopolies . . . may constitute virtually the whole market." The price of a local call at a typical location is subject to numerous market influences, including other nearby phones, mobile phones, and location providers' sensitivities to customer complaints.

The Commission need not make the findings necessary for forbearance under Section 160, since the Commission is not otherwise required to regulate payphones.

Rural and other underserved areas may receive more service once rates are at realistic levels. The Commission has adopted numerous safety valves as well as a phased approach to deregulation with continuing oversight that are more than adequate to address residual public welfare concerns.

Similarly, the Commission has judiciously exercised its explicit authority to preempt state entry and exit barriers. The states are asked to undertake this task and left ample room to address public safety concerns about telephone placement with competitively neutral rules.

The NPRM gave ample notice by specifically discussing the Commission's intention to address local coin rates. The Commission's decision to deregulate local coin rates was a "logical outgrowth" of the NPRM's proposals.

The RBOCs should not be eligible for payphone compensation before April 15, 1997, subject only to removing payphone costs from Part 69 access charges. The Act and the order also require an end to intrastate subsidies, and the RBOCs must demonstrate that such subsidies have been terminated. Further, discrimination is a form of subsidy, and therefore, there should be no payphone compensation for RBOCs until CEI plans have been approved. Finally, because the removal of LEC payphones from regulated accounts is likely to involve very similar or the same issues for all RBOCs, a uniform time frame will allow appropriate comparisons and benchmarking.

The Commission should allow flexibility in establishing demarcation points so long as there is strict adherence to nondiscrimination and equal treatment of independent PSPs by the RBOCs.

The value of intangibles and the fair market value must be considered in any transfer or reallocation of assets to an RBOC affiliate if they would be considered in a transaction with an unaffiliated entity. The Commission's Rules do provide for such assets to appear on a carriers books when they are acquired. There are similar requirements for the seller. It would be anomalous for assets to have a lower value when they are transferred to an affiliate than when they are transferred to a non-affiliate.

Even if the Commission's rules did not already address these points, the Commission has ample authority under Section 276 to change its rules. And because this proceeding is a rulemaking, the Commission has general authority to amend its rules The changes, if any, required to adopt the policies set forth above are a logical outgrowth of the discussion and proposals in the NPRM.

The Commission can and should require tariffing of coin lines and coin functionality at the federal level. These lines will be used for both intrastate and interstate service. The Commission has required other PSP functionalities to be tariffed at the federal level. Continuing federal oversight is essential to ensure that the Commission carries out its Section 276 mandate to ensure that the RBOCs do not discriminate through the tariffs they adopt for services used primarily by their own payphones.

Allowing the RBOCs to provide their own branded interLATA operator services would violate the restriction on providing interLATA service.

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To: The Commission

NEW JERSEY PAYPHONE ASSOCIATION'S OPPOSITION TO PETITIONS FOR RECONSIDERATION OF STATES AND LECs

The New Jersey Payphone Association ("NJPA") hereby opposes the petitions filed by various state commissions[1] and local exchange carriers[2] requesting reconsideration of the Report and Order in this proceeding, FCC 96-388, released September 20, 1996.

1 Sixteen states had participated in the proceeding leading to the Order. Fourteen states (including the District of Columbia, have now filed petitions for reconsideration. Individual petitions were filed by five states (California, New York, Ohio, Oklahoma, and Texas). In addition, New Mexico filed a petition that was joined by Indiana, and Maine filed a petition that was joined by Alabama, Maryland, Montana, Vermont, Virginia and the District of Columbia. Of the fourteen states, eleven (California, Indiana, Maine, Montana, New Mexico, New York, Ohio, Oklahoma, Texas, Vermont, and Virginia) have previously filed in this proceeding, generally taking positions not inconsistent with their present position. (Five states that previously participated have not sought reconsideration.) Thus, the number of states participating has actually declined. The three newcomers (Alabama, the District of Columbia, and Maryland) are all additional signatories to the Joint States Petition, led by Maine, which also led the Joint States comments in the earlier phases of this proceeding.

2 Ameritech, BellSouth, RBOC Coalition, and Southwestern Bell.

I. DEREGULATION OF THE LOCAL COIN RATE IS THE CORRECT POLICY AND IS CLEARLY WITHIN THE FCC'S SECTION 276 AUTHORITY

A. Deregulation Of The Local Coin Rate Is Clearly Within The Commission's Section 276 Authority

Various state commissions contend that, notwithstanding the unequivocal language of Section 276, the Commission lacks authority to prescribe the charge to be collected by payphone providers in the form of a coin deposit when their payphones are used to make local calls. These parties cite preexisting Section 2(b), which states:

> nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . .

47 U.S.C. § 152(b).

The petitioning states note that the Supreme Court has stated that Congressional grants of FCC jurisdiction over intrastate service must be "straightforward" or "unambiguous" in order to override the prohibition of Section 2(b). See, e.g., Joint States' Petition at 3-4, quoting Louisiana Public Service Commission v. FCC, 476 U.S. 355, 377 (1986). In this instance, the language of Section 276 provides precisely the type of "straightforward" and "unambiguous" grant of jurisdiction over intrastate service that the Supreme Court was referring to in Louisiana.[3]

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[3] In this regard, the language of Section 276 is virtually unique in the Act. The grant of jurisdiction over intrastate matters in the payphone provision is far more explicit, for example, than the language of Section 251 regarding pricing that is currently at issue in the 8th Circuit court of appeals. See Iowa Utils. Bd. v. FCC, Order Granting Stay Pending Judicial Review, (8th Cir., No. 96-3321), released October 15, 1996), application to vacate stay pending (U.S. Sup. Ct., filed October 24, 1996).

1. Section 276 is a "straightforward" and "unambiguous" grant of intrastate jurisdiction.

There is no ambiguity whatsoever about Congress' intention to give the Commission the authority and the mandate to ensure that PSPs are "fairly compensated for each and every completed intrastate . . . call."[4] Thus, there is a direct conflict between the specific terms of Section 276, which give the Commission jurisdiction over intrastate payphone rates, and the general terms of the pre-existing Section 2(b), which denies the Commission jurisdiction over intrastate rates. In these circumstances, as implicitly recognized by Louisiana, the principles of statutory construction direct that:

> Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.

Sutherland, Statutory Construction, § 22.34. Further:

> [i]f the new provisions and the reenacted or unchanged portions of the original section cannot be harmonized, the new provisions should prevail as the latest declaration of the legislative will.

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4 The focus on intrastate calls is quite deliberate, and cannot be dismissed as an instance of sloppy draftmanship. The word "intrastate" is used three times in Section 276. In addition to ensuring fair compensation for "each and every" intrastate call, the Commission is directed to discontinue "the intrastate and interstate carrier access charge payphone service elements" and "all intrastate and interstate payphone subsidies." 47 U.S.C. § 276(b)(1)(B). Section 276 also expressly requires that the Commission's Section 276 regulations should preempt any inconsistent state regulations. 47 U.S.C. § 276(c). The repeated and deliberate inclusion of intrastate payphone service within Section 276, coupled with an express mandate to preempt inconsistent state regulations, reflects a specific Congressional intent to give the FCC plenary responsibility to restructure the regulation of both intrastate and interstate payphone service. In other words, Congress deliberately created a payphone exception to the traditional division of jurisdiction under Title II of the Act.

Id. In this case, Section 276(b) is the more specific provision because it directs the Commission to regulate intrastate payphone calls, while Section 2(b) is a more generic prohibition against exercising jurisdiction over intrastate calls.[5] In addition, Section 276 is the later provision, while Section 2(b) is the earlier. Therefore, Section 276 prevails on both counts.

2. Section 276 authorizes deregulation of the local coin rate.

Some states also argue that, even though Section 276(b)(1)(A) expressly authorizes the Commission to "prescribe regulations" that ensure that payphone service providers are fairly compensated for "each and every intrastate . . . call," the section should not be interpreted to give the FCC authority to deregulate local coin calling rates in order to ensure that compensation for such calls is fair.

> "Compensation" and "compensation plan" must be understood as terms of art that refer only to compensation between owners of payphones and carriers and not to the "compensation" paid by end-user consumers who deposit coins in payphones for the purpose of making local calls.

Joint States' Petition at 5. It should be noted that even if this narrow interpretation of Section 276 were correct, it would not succeed in removing the direct conflict between

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[5] Since Section 276 specifically addresses "jurisdiction," it is materially different from Section 220 of the Act, which is specific but which did not specifically grant jurisdiction over intrastate matters. In Louisiana, the Supreme Court rejected the Commission's argument that the specific language of Section 220 prevailed over the general language of Section 2(b), pointing out that Section 220 did not specifically address jurisdiction. 476 U.S. at 376, n. 5. Since Section 276 does specifically address jurisdiction, it is not subject to this same argument. Further, since Section 276 specifically addresses jurisdiction and was enacted later than Section 2(b), it overrides the "rule of construction" contained in Section 2(b). See id.

Section 276 and Section 2(b). The Joint States' interpretation still leaves the Commission with a mandate to ensure fair compensation for each and every intrastate dial-around call -- a regulatory task that Section 2(b) previously reserved to the states. Therefore, the Joint States' interpretation of Section 276 cannot be adopted on the basis that it is necessary or sufficient to "harmonize" Section 276 with Section 2(b).

In any case, the Joint States' interpretation is fatally flawed and contrary to the manifest purpose of Section 276. If the Commission had failed to comprehensively address compensation for local coin calls, it would have contravened the plans meaning and clear purpose of Section 276.

According to the Joint States, the compensation provision of Section 276 was modeled on the compensation provision of Section 226, which specifically provides that the Commission is to consider only compensation ("other than advance payment by consumers"). The Joint States argue that that same limitation is implied in the use of the word "compensation" in Section 276. Id. at 5-6. However, it is precisely the absence of the qualifier "(other than advance payment by consumers)" that demonstrates that "compensation" in Section 276 was intended to be broader in scope and to include all forms of compensation, including the payment of coins on local calls.[6]

The Joint States argue further that the statute draws a distinction between "compensation" paid by carriers, and "rates and charges" paid by end users. Id. at 8.

[6] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983).

NJPA agrees that there is a distinction between the two terms, but not the one claimed by the Joint States. "Compensation" is a broader term that encompasses all revenues received by PSPs, including but not limited to "rates and charges" assessed on end users.

The narrow construction of "compensation" urged by the Joint States, which would exclude any compensation derived from coins or from rates charged to end users, is inconsistent with the legislative history of Section 276. In reporting out the House version of Section 276 (to which the Senate receded), the House Commerce Committee specifically stated that "[c]arriers and customers that benefit from the availability of a payphone should pay for service they receive...." H.R. Rep. No. 204, Part 1, 104th Cong., 1st Sess. 88 ("House Report").

Further, the interpretation that limits compensation to carrier-paid compensation leads to incoherence. The phrase "each and every call" is all-inclusive: the Joint States cannot dispute that the scope of this language in the compensation provision includes local coin calls.[7] If such calls are included within the scope of the compensation provision, then there must be some "compensation" on those calls to which the provision refers. The Joint States never answer the question -- what is the "fair" compensation owed to PSPs by carriers on such calls? The reason they do not is that the only logical answer is that the "compensation" on these calls referred to by Section 276 is the coins deposited to make the call.

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[7] Congress specifically exempted from the reach of Section 276(b)(1)(A) only two narrow categories of calls -- emergency calls and telecommunications relay service calls. If Congress had also intended to exclude local coin calls, it surely would have explicitly said so.

The Commission's reasonable construction of "compensation" to include all forms of revenue collected by PSPs on "each and every" call is the only construction that is consistent with the manifest purposes of Section 276. The Joint States claim that the compensation plan under Section 276(b)(1)(A) was intended only to replace Part 69 access charge subsidies, existing contracts between independent PSPs and carriers, and the existing $6.00 interstate payphone compensation charge. But that is not what Section 276 says. Section 276(b)(1)(B) directs the Commission to discontinue "all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (a)". Thus, the compensation plan cannot have the limited purpose ascribed to it by the Joint States. Under the Act, the compensation plan must be a comprehensive replacement for all existing subsidies.

This broader interpretation of Section 276 is also strongly supported by the legislative history of Section 276. The House Report plainly states: "Section [276] terminates the current system of payphone regulation." There is absolutely no legitimate reason to believe that Congress intended the Commission to "terminate the current system of payphone regulation" and establish a compensation plan to replace it, without in any way altering state regulation of the current compensation derived from local coin calls. Indeed, since no party disputes that current local coin rates can only be supported by subsidies, it would have been impossible for the FCC to carry out its statutory mandate without changing the state-regulated compensation for local coin calls.

B. The Payphone Market In General Is Essentially Competitive And Warrants Deregulation Of Coin Rates

Various states also argue that deregulation of local coin rates is unwarranted because the payphone market as a whole is not workably competitive. The states provide virtually no support for this argument.[8] Instead, they seize upon the Commission's discussion of "locational monopolies" and engage in the undergrounded speculation that "locational monopolies . . . may constitute virtually the whole market." Joint States at 11. Only the most distorted reasoning could label the typical payphone location such as a convenience store or fast-food restaurant as some kind of "monopoly". In virtually all payphone locations, it is obvious that the price of a local call is susceptible to numerous market influences, including (1) the ability of customers to use another nearby payphone, (2) the ability of customers to use mobile phones rather than payphones; and (3) the ability of customers to complain to the location owner or avoid patronizing a business that has unreasonably priced payphones. No location owner will tolerate losing a customer because payphones cost too much.[9]

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[8] To the extent that PSPs do not voluntarily reduce local coin rates below a 25 cents ceiling (Peoples Counsel at 9), that fact does not show that the payphone market is not competitive. It only shows that unsubsidized competitors cannot underprice a subsidized rate.

[9] The Ohio Public Service Commission states that some local governments provide exclusive contracts for payphones at all government locations. To the extent that such exclusive contracts pervasively restrict the ability of competing PSPs to serve the payphone market in a community, they may constitute an impermissible entry barrier that is prohibited by the Commission's rules. However, such pervasive foreclosure of competition would not be the ordinary effect of a single private location owner's granting of exclusive contracts to serve a few locations in a community.

The Joint States also argue that the Commission has not made the findings necessary to forbear from regulation pursuant to Section 160(a). The Commission's findings are ample to support its Order. However, findings under Section 160(a) are not required. Nothing in the Act requires the Commission to regulate local coin rates. Rather, the Commission is required to "ensure that PSPs are fairly compensated . . . ." It is entirely reasonable and logical for the Commission to conclude, as it did, that the most efficient and effective means of ensuring that PSPs are fairly compensated is to let the market regulate their rates.

The Joint States also contend that some rural areas may not have a sufficient number of payphones to ensure a competitive market. As the Joint States suggest, such conditions arguably should be addressed through support mechanisms such as the public interest payphone programs specifically authorized by Section 276. However, the existence of a need to encourage more payphones in rural areas does not dictate that local coin rates at such payphones must be regulated,[10] and certainly provides no basis for an attack on the Commission's deregulation of local coin rates in general.

A number of states raise concerns about affordability of service in areas where payphones serve as a substitute for residential service, Ohio at 7; Peoples Counsel at 7. To

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10 The cause of scarcity of payphones in some rural areas may well be the capping of local coin rates at below-market levels. Allowing rates to rise to market levels is likely to stimulate increased availability of rural payphones. Indeed, the record suggests that the level of payphones generally has not increased significantly in years. According to the Order, there were approximately 1.85 million payphones in 1995. Order, ¶ 9. This does not significantly exceed the numbers previously reported, and supports the Commission's decision to end artificial price ceilings in order to "promote the widespread deployment of payphone services . . . ." 47 U.S.C. § 276(b).

the extent that legitimate concerns about affordability need to be addressed, the Commission itself has provided a mechanism whereby states can request specific exemptions from deregulation of coin rates. Order, ¶ 61.

Indeed, the Commission's whole approach to local coin deregulation has been characterized by caution and restraint. The Commission has deferred regulation for one year, giving state commissions ample opportunity to prepare for the change. Order, ¶ 60. Further, the Commission has expressly invited the states to formally present any findings they make during that year that justify an exemption from local coin deregulation in specific circumstances. Id., ¶ 61. Finally, the Commission has promised to carefully monitor the initial phase of deregulation to exercise that market failures are appropriately addressed. Id. This cautious, restrained approach is more than adequate to address those scenarios suggested by the states that have some basis in realism.

C. There Is Ample Support For The Commission's Decision To End Entry And Exit Regulation

The States also request reconsideration of the Commission's decision to preempt entry and exit regulation of PSPs. Authority to take this step is expressly provided by Section 276(c), which requires preemption of any state regulation that is inconsistent with the Commission's implementing regulations. 47 U.S.C. § 276(c). The Commission's regulations remove subsidies and discrimination and rely on the market to take the place of subsidies and discrimination. The Commission logically and correctly concluded that regulations that restrict competition, including entry and exit regulation, are inconsistent with market-based regulations, and would perpetuate subsidies and discrimination, and therefore must be preempted.

Contrary to the concerns expressed by California (at 2-3) and Joint States (at 16) regarding anti-drug trafficking regulations, the Commission expressly ruled that competitively neutral state regulations would not be considered entry regulation or restrictions on competition. Order, ¶ 60. Thus, anti-drug regulations would not be vulnerable to preemption as long as they are competitively neutral.

D. Ample Notice Was Provided Of Coin Rate Deregulation And Preemption Of Competitive Restrictions

The State Commissions also argue that no sufficient notice was given prior to the Commission's adoption of coin rate deregulation and preemption of competitive restrictions. The Notice of Proposed Rulemaking, FCC 96-254, released June 6, 1996 ("NPRM"), specifically noted that local coin calls were subject to the compensation provision of Section 276, invited comment on how to ensure that PSPs were fairly compensated for local coin calls (NPRM, ¶¶ 19-22) and enumerated a non-exhaustive series of options for carrying out the statutory mandate with respect to such calls. The NPRM also specifically "further ask[ed] whether the states' setting of the rates for local coin calls subject to complaint or petition would be consistent with Section 276's mandate that the Commission ensure fair compensation for "each and every completed intrastate and interstate call."" NPRM, ¶ 22. The Commission's determination that local coin rates generally should be deregulated and that the states should be preempted from continuing to regulate such rates is clearly a "logical outgrowth" of this portion of the NPRM. See, e.g., American Medical Association v. United States, 887 F.2d 760 (7th Cir. 1989). Indeed, the issue of local coin deregulation was vigorously debated in the comment period. Most of the petitioning states filed reply comments on this issue.

II. THE LEC PETITIONS GENERALLY LACK MERIT

A. The LECs Should Not Be Allowed To Deregulate Before All State And Federal Requirements Are Satisfied

The RBOC Coalition requests that LEC payphones be eligible for payphone compensation and other benefits of deregulation prior to the April 15, 1997 deadline, provided only that payphone costs have been removed from Part 69 access charges. NJPA opposes this request for three reasons.

First, it is not enough for costs to be removed from interstate access charges. The Commission's payphone compensation plan addresses intrastate as well as interstate dial-around calls. The Act requires termination of all subsidies -- intrastate and interstate -- before the LECs can benefit from the new compensation plan. § 276(b)(1)(B). See also Order, ¶ 186. A LEC should not be eligible for interim compensation if it has not provided satisfactory evidence that all intrastate as well as interstate subsidies have been removed.

Second, the RBOCs should not be permitted to benefit from payphone compensation until they have had their CEI plans approved. Subsidies cannot be said to have been terminated until discriminatory access arrangements are also terminated. As discussed in the New Jersey Payphone Association's ("NJPA") petition for reconsideration, it does not appear that the RBOCs and other LECs have yet begun to provide even the most basic forms of nondiscriminatory access such as rate-selectable coin lines. Full compliance with CEI requirements by the RBOCs, and some proof of compliance with nondiscrimination requirements by other LECs, must be a precondition to participation in the compensation plan. Otherwise, there will be insufficient incentives for RBOCs and other LECs to comply with these critical requirements.

Third, the process of removing LEC payphones from regulation is likely to involve contentious accounting and discrimination issues that are common to all LECs. In order to promote administrative convenience and effective "benchmarking" to ensure full compliance, the Commission should adhere to the existing deadlines and not permit removal of payphones from regulation in advance of those deadlines.

B. Demarcation Point/Minimum Point Of Entry

The RBOC Coalition requests that the Commission allow flexibility in the establishment of the demarcation point for "inside" wiring, so that, where it is more efficient to establish the demarcation point at some place other than the "minimum point of entry," LECs may do so. NJPA does not object, provided that the FCC makes clear that LECs are required to follow nondiscriminatory practices and to establish the demarcation point at a similar place when it benefits independent PSPs.

C. Bell Companies' Arguments Against Going Concern Valuation Are Without Merit

The RBOC Coalition and various individual Bell companies also contend that, even when payphone operations are placed in an affiliate, or when they are placed in a division that does not share common assets and resources with the regulated operating company, the Commission may not include in the "fair market value" of the transferred assets the value of "assets that (like most intangibles) do not appear on RBOC books and are not a source of regulated compensation to be included in the "fair market" valuation." BellSouth at 19. To the extent that the RBOCs argue that intangibles cannot be included in "fair market value" even though they would be included in the price paid in the marketplace by an unaffiliated party that was purchasing an RBOC payphone operations, NJPA urges the Commission to deny these petitions.

The RBOCs are wrong when they suggest that intangible assets "do not appear on RBOC books" and that there is no precedent in the Commission's accounting rules for using a going concern valuation based on intangible as well as tangible asset values. The FCC's accounting rules themselves provide for intangibles to be booked as assets by the acquiring carrier when one carrier's facilities are acquired by another carrier. 47 CFR §§ 32.2000(b)(1), (2)(iv), 2005, 2007. In such circumstances, there are numerous state regulatory decisions indicating that such intangibles are includable in the assets on which the company earns a rate of return.

On the selling company's side, the rules clearly provide that "[t]he difference, if any, between the [net book value of sold plant] and the consideration received . . . for the property shall be included in Account 7350, "Gains and Losses from Disposition of Certain Property." 47 CFR § 32.2000(d)(5). Such gains and losses would include the intangibles booked by the acquiring company as "Telecommunications Plant Adjustments" or "Goodwill."[11]

Clearly, in any pre-Telecommunications Act sale of a regulated carrier's payphone business to another regulated carrier, the purchase price would include the perceived value of intangibles such as location contracts and goodwill, in addition to whatever value the payphone equipment would have as pure inventory. The excess of the value of such intangibles over net book value would be booked by the selling and acquiring carriers in the manner described above. The RBOCs cannot credibly argue that "fair market value" of payphone assets should have a lower value in the affiliate transaction context than it would have in the context of an unaffiliated sale.

Further, contrary to BellSouth's claim, even if the Commission's existing affiliate transaction rule did not already provide for the inclusion of intangibles in "fair market value" of transferred payphone assets, the Commission's ruling to that effect is clearly a "logical outgrowth" of the Commission's NPRM. The NPRM reached a tentative conclusion that payphone assets should be transferred at "underappreciated baseline cost," sought comment on "the specific assets to be transferred," tentatively concluded that "the assets to be transferred should be defined generally in terms of CPE deregulation," and sought comment on "our tentative conclusions and the general approach to asset transfers

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11 Numerous states have ruled that such intangibles may be treated as assets by the acquiring company. See, e.g., Alabama Gas Corporation, 157 P.U.R. 4th 414 (1994); Mobile Gas Service Corp., Docket 22880, April 12, 1993, and cases cited therein.

outlined here." NPRM, ¶ 49. This portion of the NPRM provided ample notice as to the Commission's decision on valuation of payphone assets transferred to an affiliate, or any other supportable decision on payphone asset valuation for purposes of deregulation, as a "logical outgrowth" of the NPRM.[12]

The RBOCs have consistently tried to strait-jacket the FCC on the valuation issue, and confine the Commission to its existing rules. Regarding affiliate transactions, as discussed above, it is clear that the decision in this proceeding is fully consistent with existing rules. But no strait-jacket is warranted in any event. As NJPA pointed out in its own petition for reconsideration, this is a rulemaking. The Commission can change its existing rules.

D. Federal Tariffing

BellSouth urges the Commission to reconsider its decision requiring federal tariffing of coin line functionalities. NJPA believes that Computer III provides ample precedent supporting the federal tariffing of such functionalities. Further, since Computer III is only the minimum level of safeguards required to be adopted under Section 276, the Commission is free to require federal tariffing that goes beyond the Computer III precedent, provided that such requirements are consistent with the Communications Act.

There can be little doubt that federal tariffing of coin line functions is fully consistent with the Communications Act. Coin line functions would be used by PSPs in

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12 The RBOCs vigorously debated this issue (see RBOC Coalition Reply Comments at 19-21; Letter to William Caton, Secretary, from Michael Kellogg, dated August 30, 1996), and should not be allowed to claim that there was no notice.

connection with both interstate and intrastate services. Recent FCC decisions have required federal tariffing of other types of payphone functionalities, including originating line screening and billed number screening, as well as international call blocking. These functionalities must be available to PSPs pursuant to federal tariffs even though PSPs generally use exchange service to connect their payphones and are subject to the end user common line charge rather than the carrier common line ("CCL") charge. Therefore, the legal arguments raised by BellSouth against federal tariffing of coin line functionalities are without merit.

As a matter of policy, as well, federal tariffing of coin line functionalities is in the public interest. As the Commission recognized in the Order, state regulation of payphone service has resulted in numerous state regulations that hinder rather than promote the development of full and fair competition. Order, ¶ 49. Continuing federal oversight is essential to ensure that PSPs are not overcharged for the network functionality that they require, and that LECs do not use tariffs for coin line functions that are useful primarily for their own payphones as a vehicle for effectively subsidizing their own payphone services in violation of Section 276(b).

Accordingly, the Commission should retain its requirement that coin line functionalities be federally tariffed. In the event that the Commission does reconsider this requirement, the Commission should ensure that it retains continuing effective oversight of the manner in which LECs are pricing these services. In addition to requiring that initial Bell company tariffs be filed with the Bell companies' CEI plans, the Commission should require that all LECs maintain copies of their coin line tariffs on file at the Commission, with updating to reflect any revisions in the tariffs. The Commission should retain jurisdiction to require formal filing of the tariffs if that should prove necessary in order to prevent subsidies and discrimination that violate Section 276(a) or (b)(1)(B) of the Act.

E. Branding

NJPA opposes BellSouth's request for reconsideration or clarification of its ruling that Bell companies' authority to select the interLATA carrier serving their payphones does not include the authority to provide interLATA operator services to end users pursuant to branding. To the extent that a Bell company is represented, via branding, as a provider of interLATA service, the Bell company is in violation of the Act's current prohibition on Bell companies' provision of interLATA service. 47 U.S.C. § 271(a). Even assuming the Commission were free to waive that prohibition, it should not do so unless and until it has made the necessary findings that such provision of interLATA service is in the public interest and satisfies the competitive test of Section 271.

CONCLUSION

The petitions for reconsideration of the states and LECs should be denied.

Dated: October 28, 1996

Respectfully submitted,

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